

## **Title 2. California Public Employees' Retirement System**

### **NOTICE OF PROPOSED REGULATORY ACTION**

NOTICE IS HEREBY GIVEN that the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS) proposes to take the regulatory action described below in the Informative Digest after considering public comments, objections, or recommendations.

#### **I. PROPOSED REGULATORY ACTION**

In this filing, the Board proposes to add Article 6.5 entitled "Membership" in Title 2 of the California Code of Regulations. Sections 578 and 578.1 would be added to Article 6.5. The proposed regulatory action interprets Government Code sections 20125 and 20028 and makes specific the criteria to be used when determining whether an individual qualifies as an employee for CalPERS retirement purposes.

#### **II. WRITTEN COMMENT PERIOD**

Any person interested may submit written comments relevant to the proposed regulatory action. The written comment period closes at 5:00 pm on **December 1, 2008**. The Regulations Coordinator must receive all written comments by the close of the comment period. Comments may be submitted via fax at (916) 795-4607; e-mail at: [joe\\_parilo@calpers.ca.gov](mailto:joe_parilo@calpers.ca.gov); or mailed to the following address:

Joe Parilo, Acting Regulations Coordinator  
California Public Employees' Retirement System  
P.O. Box 942702  
Sacramento, California 94229-2702  
Telephone: (916) 795-3484

#### **III. PUBLIC HEARING**

Comments on the proposed action will also be taken at a public hearing to be placed on the agenda of the regularly scheduled meeting of the CalPERS Benefits and Program Administration Committee of the CalPERS Board:

**December 17, 2008**

**9:00 a.m.**

California Public Employees' Retirement System  
Lincoln Plaza North, Auditorium  
Auditorium, 400 P Street  
Sacramento, California 95814

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#### **IV. ACCESS TO HEARING ROOM**

The hearing room will be accessible to persons with mobility impairments, and can be made accessible to persons with hearing or vision impairments upon advance request to the Regulations Coordinator.

#### **V. AUTHORITY AND REFERENCE**

The CalPERS Board of Administration has general authority to take regulatory action under Government Code section 20121. Under Government Code section 20125, the Board has the specific authority to adopt proposed sections 578 and 578.1. This action would interpret Government Code sections 20125 and 20028 and make specific the criteria used when determining employee status for CalPERS retirement purposes.

#### **VI. INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

Government Code section 20125 authorizes the Board to “determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.” Government Code section 20028 generally defines an “employee” as “any person in the employ of” the state, a school employer or a contracting agency.

Proposed section 578 limits the scope of these regulations to interpreting the California Public Employees' Retirement Law, Government Code sections 20000 – 21765, and to employee determinations for retirement purposes.

The determination of employee status is crucial because a) retirement benefits by law may only be provided to designated employees, and b) in order to preserve the federal tax-qualified status of the system, CalPERS must ensure it provides retirement benefits only to the common law employees of the state, school employers and contracting agencies.

Proposed section 578.1 would codify CalPERS' longstanding practice of utilizing common law requirements to determine employee status and would make specific that the common law employment factors, as discussed in California case law and in a Precedential Decision by the CalPERS Board, are the criteria used to determine employee status under Government Code sections 20125 and 20028 for all individuals providing services to the state, school employers and contracting agencies.

The California Supreme Court, in 2004, confirmed that the common law employment test was the test to be used to determine if individuals were

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employees of the Metropolitan Water District (a CalPERS contracting agency) for the purposes of CalPERS eligibility. (*Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal 4th 491; often referred to the “*Cargill*” decision.)

After the *Cargill* decision, the CalPERS Board adopted as precedential its decision entitled *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard v. Tri-Counties Association for the Developmentally Disabled* (Case No. 05-01), a case which determined whether Lee Neidengard served as an employee or independent contractor when performing service for Tri-Counties Association. In this Precedential Decision, the Board cited the case of *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, which articulated the common law factors for making such a determination. Citing to *Cargill*, the Board also concluded in *Neidengard* that since the Public Employees' Retirement Law does not define “independent contractor” or “employee” of a contracting agency with greater particularity, these terms must be defined with reference to the California common law.

The proposed regulations incorporate the factors referred to in the *Tieberg*, *Cargill* and *Neidengard* decisions as the factors to be used to interpret sections 20125 and 20028 and make specific the criteria used to determine employee status for CalPERS retirement purposes.

#### **VII. EFFECT ON SMALL BUSINESS**

The proposed regulatory action does not affect small business because it applies only to public employees working in positions qualified for membership in CalPERS.

#### **VIII. DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION**

- A. **MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS:** The proposed regulatory action does not impose a mandate on local agencies or school districts.
- B. **COST OR SAVINGS TO ANY STATE AGENCY:** The proposed regulatory action may achieve a cost savings for CalPERS, resulting from decreased litigation and administrative appeals as employers and individuals become more aware of the criteria used to determine employee status for CalPERS retirement purposes.
- C. **COST TO ANY LOCAL AGENCY OR SCHOOL DISTRICT:** The proposed regulatory action does not impact costs or savings for any local agency or school district, such that costs would qualify for reimbursement under Government Code section 17500, et seq.

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- D. **NONDISCRETIONARY COSTS OR SAVINGS IMPOSED ON LOCAL AGENCIES:** The proposed regulatory action does not impose non-discretionary costs or savings on local agencies.
- E. **COSTS OR SAVINGS IN FEDERAL FUNDING TO THE STATE:** The proposed regulatory action does not impact any federal funding to the state.
- F. **ADVERSE ECONOMIC IMPACT:** The proposed regulatory action has no significant statewide adverse economic impact directly affecting businesses, including the ability of business in California to compete with business in other states.
- G. **COST IMPACT ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES:** CalPERS is not aware of any cost impacts that representative private persons or businesses would necessarily incur in reasonable compliance with the proposed action.
- H. **IMPACT ON JOBS AND BUSINESSES WITHIN CALIFORNIA:** The proposed regulatory action will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing businesses within California; or (3) affect the expansion of businesses currently doing business within California.
- I. **EFFECT ON HOUSING COSTS:** The proposed regulatory action has no effect on housing costs.

#### **IX. CONSIDERATION OF ALTERNATIVES**

The Board must determine that no reasonable alternative considered by the Board or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome to affected private persons than the proposed action. The alternative of adopting no regulation would be less effective and would not lead to the anticipated benefits expected from the proposed action.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation at the above mentioned hearing or during the written comment period.

#### **X. CONTACT PERSONS**

Please direct inquiries concerning the substance of the proposed regulatory action to:

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Steve Propp  
Employer Services Division  
California Public Employees' Retirement System  
P.O. Box 942709  
Sacramento, California 94229-2709  
Telephone: (916) 341-2473  
Fax: (916) 341-2744  
E-mail: [steven\\_propp@calpers.ca.gov](mailto:steven_propp@calpers.ca.gov)

Please direct requests concerning processing of this regulatory action to Joe Parilo, Acting Regulations Coordinator, at the address shown above, or (916) 795-3484 ([joe\\_parilo@calpers.ca.gov](mailto:joe_parilo@calpers.ca.gov)).

#### **XI. AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS**

The entire rulemaking file is available for public inspection through the Acting Regulations Coordinator at the address shown above. To date the file consists of this notice, the proposed text of the regulations, and the Initial Statement of Reasons (ISOR). A copy of the proposed text and the ISOR is available at no charge upon telephone or written request to the Acting Regulations Coordinator.

The Final Statement of Reasons can be obtained, once it has been prepared, by written request to Joe Parilo, Acting Regulations Coordinator, at the address shown in Section II.

#### **XII. AVAILABILITY OF MODIFICATIONS TO PROPOSED AMENDMENT**

The Board may, on its own motion or at the recommendation of any interested person, modify the proposed regulations after the public comment period has closed. It may amend the proposed regulations as modified, if the changes are sufficiently related to the original text so the public could have anticipated them.

If the Board modifies its regulatory action in this manner, it will prepare a comparison of the original proposed text and the modifications for an additional public comment period of not less than 15 days prior to the date on which the Board adopts, amends or repeals the resulting regulation. A copy of the modified text will be mailed to all persons who submitted written comments, who testified or submitted written comments at the public hearing, or asked to be kept informed as to the outcome of this regulatory action.

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- XIII. One can access the regulatory material regarding this action at CalPERS' website at [www.calpers.ca.gov](http://www.calpers.ca.gov) under *About CalPERS > Legislation, Regulations & Statutes > Regulatory Actions > Current Regulatory Actions*.